

1  
2  
3  
4 I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY  
5 FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES)  
6 (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF  
7 RECORD IN THIS ACTION ON THIS DATE.

8 DATED: 16/8/2011

9 DEPUTY CLERK

10  
11 UNITED STATES DISTRICT COURT  
12  
13 CENTRAL DISTRICT OF CALIFORNIA

14 DWIGHT GRANDBERRY,  
15 Petitioner,  
16 vs.  
17 B.M. CASH, Warden,  
18 Respondent.

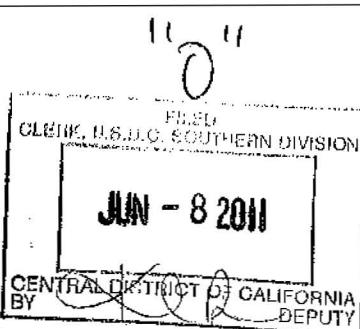
19 Case No. CV 11-3798-MMM (RNB)

20 ORDER SUMMARILY DISMISSING  
21 PETITION FOR WRIT OF HABEAS  
22 CORPUS FOR LACK OF SUBJECT  
23 MATTER JURISDICTION

24 On May 11, 2011, petitioner filed a Petition for Writ of Habeas Corpus by a  
25 Person in State Custody herein.

26 The Petition purports to be directed to petitioner's 1994 conviction in Los  
27 Angeles Superior Court for carjacking, for which petitioner received a 31-year  
28 sentence. The sole claim alleged in the Petition is an instructional error claim.

29 This is at least the twelfth habeas petition filed by petitioner in this Court  
30 directed to his 1994 conviction and/or sentence. The first four petitions were each  
31 dismissed without prejudice for failure to exhaust state remedies. The fifth petition,  
32 filed in Case No. CV 99-06270-WDK (RNB), was dismissed with prejudice on  
33 October 14, 1999, for being time barred. While petitioner purported to file a notice  
34 of appeal from the Judgment in Case No. CV 99-06270-WDK (RNB), his requests  
35 for a certificate of appealability ("COA") were denied in turn by the District Court



1 and the Ninth Circuit. Further, on June 20, 2001, the Ninth Circuit denied  
2 petitioner's application to file a second or successive petition.

3 The Petition now pending is governed by the provisions of the Antiterrorism  
4 and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) ("the  
5 Act"), which became effective April 24, 1996. Section 106 of the Act amended 28  
6 U.S.C. § 2244(b) to read, in pertinent part, as follows:

7                   *(1) A claim presented in a second or successive habeas corpus  
8 application under section 2254 that was presented in a prior  
9 application shall be dismissed.*

10                   *(2) A claim presented in a second or successive habeas corpus  
11 application under section 2254 that was not presented in a prior  
12 application shall be dismissed unless--*

13                   *(A) the applicant shows that the claim relies on a new  
14 rule of constitutional law, made retroactive to cases on collateral  
15 review by the Supreme Court, that was previously unavailable; or*

16                   *(B)(i) the factual predicate for the claim could not have  
17 been discovered previously through the exercise of due diligence;  
18 and*

19                   *(ii) the facts underlying the claim, if proven and viewed  
20 in light of the evidence as a whole, would be sufficient to  
21 establish by clear and convincing evidence that, but for  
22 constitutional error, no reasonable factfinder would have found  
23 the applicant guilty of the underlying offense.*

24                   *(3) (A) Before a second or successive application permitted  
25 by this section is filed in the district court, the applicant shall  
26 move in the appropriate court of appeals for an order authorizing  
27 the district court to consider the application.*

28                   *...*

*(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.*

(4) *A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.*

11 The Petition now pending constitutes a second and/or successive petition  
12 challenging the same judgment of conviction as petitioner's prior habeas petition in  
13 Case No. CV 99-06270-WDK (RNB), within the meaning of 28 U.S.C. § 2244(b).  
14 See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding that dismissal  
15 of a habeas petition as time barred under 28 U.S.C. § 2244(d)(1) constitutes a  
16 disposition on the merits and renders a subsequent petition second or successive for  
17 purposes of 28 U.S.C. § 2244(b)). Thus, to the extent that petitioner is now  
18 purporting to raise an instructional error claim that he previously raised in Case No.  
19 CV 99-06270-WDK (RNB), § 2244(b)(1) precludes the Court from considering it.

20 To the extent that petitioner is now purporting to raise an instructional error  
21 claim that he did not previously raise in Case No. CV 99-06270-WDK (RNB), it was  
22 incumbent on him under § 2244(b)(3)(A) to secure an order from the Ninth Circuit  
23 authorizing the District Court to consider his new claim, prior to his filing of the  
24 instant Petition in the District Court. See Cooper v. Calderon, 274 F.3d 1270, 1274  
25 (9th Cir. 2001), cert. denied, 538 U.S. 984 (2003). Such permission will be granted  
26 only if “the application makes a prima facie showing that the application satisfies the  
27 requirements of [Section 2244(b)].” See id. Only after the Circuit has made the  
28 initial determination that the petitioner has made a prima facie showing under §

1 2244(b)(2) does the district court have any authority to consider whether the  
2 petitioner has, in fact, met the statutory requirements of § 2244(b). Under §  
3 2244(b)(4), the petitioner must make “more than another *prima facie* showing” in the  
4 district court; the “district court must conduct a thorough review of all allegations and  
5 evidence presented by the prisoner to determine whether the [petition] meets the  
6 statutory requirements for the filing of a second or successive petition.” See United  
7 States v. Villa-Gonzalez, 208 F.3d 1160, 1164-65 (9th Cir. 2000). While it does not  
8 appear to the Court that petitioner can make the requisite showing under § 2244(b)(2)  
9 with respect to his instructional error claim, that is a determination for the Ninth  
10 Circuit to make in the first instance. If petitioner’s instructional error claim  
11 constitutes a new claim, his failure to secure an order from the Ninth Circuit  
12 authorizing the District Court to consider it, prior to his filing of the Petition in this  
13 Court, deprives the Court of subject matter jurisdiction. See Cooper, 274 F.3d at  
14 1274.

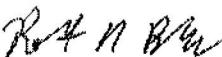
15 For the foregoing reasons, IT IS ORDERED that this action be summarily  
16 dismissed, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the  
17 United States District Courts.

18 LET JUDGMENT BE ENTERED ACCORDINGLY.  
19

20 DATED: May 31, 2011  
21

22   
23 MARGARET M. MORROW  
24 UNITED STATES DISTRICT JUDGE

25 Presented by:  
26



27 Robert N. Block  
28 United States Magistrate Judge